Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-1185

MEMORIAL CONSULTANTS, INC.,
Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS EX REL. GEORGE W. LINDBERG, COMPTROLLER OF THE STATE OF ILLINOIS,
Appellee.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT.

JURISDICTIONAL STATEMENT.

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ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT.

JURISDICTIONAL STATEMENT.

Appellant appeals from the opinion and judgment of the Appellate Court of Illinois, Third District, reversing the judgment of the Circuit Court of Peoria County and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW.

The opinion below is reported as *People ex rel. Lindberg* v. *Memorial Consultants, Inc.*, 50 Ill. App. 3d 1005, 366 N. E. 2d 127 and it is attached hereto as Appendix A. The trial court filed no opinion and made no findings.

JURISDICTION.

This action was brought on behalf of the People of the State of Illinois and claimed that appellant is engaged in the business of selling burial vaults in advance of need in violation of the Illinois Funeral or Burial Trust Fund Act [App. C]. Appellant denied it was subject to the Act and affirmatively asserted that if applied to its business the statute violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The trial court held in favor of appellant but on appeal the court below reversed and explicitly rejected the federal constitutional challenge.

A timely filed petition for rehearing [Ill. Rev. Stat., Chap. 110A § 367] was denied on August 30, 1977 and appellant petitioned for leave to appeal to the Illinois Supreme Court under the Ill. Rev. Stat., Chap. 110A § 315. That court summarily denied the appeal petition on November 23, 1977. Notice of Appeal to the Supreme Court of the United States [App. B] was filed in the Third District Appellate Court of Illinois on February 15, 1978 and the case is docketed in this Court on or before February 23, 1978.

Jurisdiction of the Supreme Court to review the attached decision [App. A] by direct appeal is vested by 28 U. S. C. §§ 1257(2) and 2101(c). [*Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282; *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 61 n. 3].

QUESTION PRESENTED.

Where the Illinois Funeral or Burial Trust Fund Act prohibits appellant's otherwise lawful business and creates a monopoly in favor of funeral directors selling similar products at the time of need (death) and where it bears no rational *nexus* to the public interest sought to be protected, does the statute violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States?

STATUTES INVOLVED.

The pertinent provisions of the Illinois Funeral or Burial Trust Fund Act [Ill. Rev. Stat. 1969, Chap. 111½ §§ 73.101, 73.102, 73.103 and 73.104] are set forth in Appendix C, hereto.

STATEMENT.

Appellant, Memorial Consultants, Inc., is an Illinois corporation engaged in the business of selling burial vaults prior to need (death). Appellee, as duly elected Comptroller of the State of Illinois, is the official charged with the administration and enforcement of "an Act concerning agreements for furnishing or delivery of personal property merchandise or services in connection with the final disposition of dead human bodies and regulating use or disposition of dead human bodies and regulating use or disposition of funds paid on said agreements and providing penalties for violation thereof." [Ill. Rev. Stat. 1969, Chap. 111½ §§ 73.101 *et seq* (App. C)] (called Funeral or Burial Trust Fund Act).

This suit was instituted on June 2, 1971, claiming that appellant was in the business of selling burial vaults in advance of need, that this conduct subjects it to the regulatory provisions of the Funeral or Burial Trust Fund Act and that it has failed to comply with the Act. The complaint requests an injunction to prevent violaions of the Act and an accounting of funds collected in violation of the Act. Appellant's answer and affirmative defense denies that it is subject to the Act and asserts that the Act, if applied to its burial vault business, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

In summary, the Funeral or Burial Trust Fund Act requires that the entire amount of appellant's gross receipts without any allowance for costs of goods sold nor operating expenses be entrusted when received and that "the amount or amounts so

deposited, with interest thereon . . . shall not be withdrawn until the death of the person or persons for whose funeral or burial such funds were paid" [Ill. Rev. Stat. 1969, Chap. 111½ §§ 73.102 and 73.104 (App. C)]. It is against this statutory background that the following facts stand stipulated to or admitted by the pleadings:

1. That appellant's cost of vaults sold is less than 35% of gross vault receipts and together with other operating expenses produces an average net profit margin of 5% [R. C164].

2. That appellant's sales contract provides that if the purchaser does not request delivery within 60 days following payment in full it will hold the present-day cost of the merchandise in the purchaser's name, that if the cost of the merchandise has increased by the date of delivery the purchaser will pay the additional cost and that if the cost has declined the purchaser will receive a rebate [App. A].

3. That the average life expectancy of appellant's vault purchasers is 20 years, or more, from the time the purchase agreement is made [R. C164].

4. That during the years 1972, 1973 and 1974, appellant entered into some 9000 sales agreements and that during the same period of time a substantial number of prior contracts were performed and that appellant has never acted fraudulently nor has it ever been financially insolvent [R. C208 & C209].

5. That appellant, and those similarly situated, provide the only horizontal competition to funeral directors whose sales are principally made to a decedent's next-of-kin between the time of death and time of burial and that said sales by funeral directors are much more costly to the consumer (50% to 75% higher) than are comparable sales when made by appellant [R. C162 & C199].

Based on the foregoing, the trial court, without opinion nor findings, entered judgment for appellant "in bar of plaintiff's

cause of action" and appeal was taken to the Third District Appellate Court of Illinois.

Couched in terms of appellant's brief in the Illinois Appellate Court the issues in the state court appeal were as follows:

I.

The Burial Trust Fund Act Cannot Be Reasonably Construed So as to Apply to Defendant's Burial Vault Business and to the Sales Agreement Used in Connection Therewith.

II.

If the Burial Trust Fund Act Applies to Defendant's Burial Vault Business, Then the Statute as So Construed and Applied Is Arbitrary, Confiscatory and Unreasonable in Violation of the Due Process and Equal Protection Clauses of the Federal . . . Constitution.

The Illinois Appellate Court reversed the trial court and after holding that the Funeral or Burial Trust Fund Act does indeed apply to appellant it went on to, in essence, hold that even though the statute as here applied is prohibitary as a matter of fact it is nevertheless constitutional because it merely regulates as a matter of law.

THE QUESTIONS ARE SUBSTANTIAL.

I.

That the questions are far more substantial than this particular case is evident from Federal Trade Commission proceedings concerning proposed trade regulation rules for the funeral industry [See: 40 F. R. 39901 (8/29/75) and 41 F. R. 7787 (2/20/76)]. Appendix D hereto contains excerpts from "Report by The Presiding Officer on Proposed Trade Regulation Rule Concerning Funeral Industry Practice [16 C. F. R. Part 453,

Public Record 215-46 (July, 1977)]." *Inter alia* the "Report" finds:

> Among devices used by the funeral industry to restrict pre-need sales are state laws and regulations that require a 100% burial trust fund deposit of pre-need funds. * * * If a seller must deposit 100% of the sales price of a pre-need contract he will have no funds to pay overhead, particularly salaries and commissions until a distant future date * * *. Without funds to pay overhead, prospective sellers of pre-need funerals will not enter this market. * * * * As a consequence, if a seller will not sell, the consumer is deprived of the opportunity to choose freely among alternatives which should be available to him.
>
> If a 100% requirement is excessive, what then is the appropriate actuarially based requirement? An official of the Comptroller of the State of Illinois made a study of the burial trust law of Illinois. * * * * The study indicates that the deposit of the current cost (not the sales price) of merchandise or services * * * would provide adequate funds to deliver such goods and services at any given time in the future. Results will vary as assumptions vary. The study, however, substantiates the position that a 100% deposit is not necessary as a requirement to guarantee delivery of promised funeral goods and services at a later date. [App. D, A20-A21.]

SUMMARY.

The funeral consumer can avoid problems associated with at-need sales by making funeral arrangements in advance of need. His opportunity to do so is presently restricted by the 100% trust fund laws * * *. These restrictive laws have been sponsored by traditional (at-need) funeral industry members [App. A22].

II.

The basic proposition is conceded by everyone involved, including the court below. "That appellant's business is a property right (*Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443,

465; *Traux* v. *Corrigan*, 257 U. S. 312, 327) and as such entitled to protection against state legislation in contravention of the Federal Constitution, is, of course, clear. That a corporation is a person within meaning of the due process and equal protection clauses of the Fourteenth Amendment . . . is equally well settled (Citations omitted). And, unless justified as a valid exercise of the police power, the Act assailed must be declared unconstitutional because the enforcement thereof will deprive appellant of its property without due process of law. The Act is sought to be sustained specifically upon the ground that it is reasonably calculated to promote the public (welfare) and the determination we are called upon to make is whether the Act has a real substantial relation to that end or is a clear and arbitrary invasion of appellant's property rights guaranteed by the Constitution (*Liggett Co.* v. *Baldridge*, 278 U. S. 105, 111].

Furthermore, "while this Court has not attempted to define with exactness the liberty thus guaranteed (by the Fourteenth Amendment), the term has received much consideration, and some of the included things have been definitely stated. Without doubt it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life . . . and, generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men (Citations omitted). The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts (Citations omitted)." [*Meyer* v. *Nebraska*, 262 U. S. 390, 399-400].

Whether tested by the equal protection standards applied by the Court in *Zablocki* v. *Redhail*, ... U. S. ....., 46 U. S. L. W. 4093 (1/17/78) or by the due process standards

suggested by Mr. Justice Stewart's concurring opinion in the same case, the Illinois Funeral or Burial Trust Fund Act cannot stand scrutiny.

The sole avowed purpose of the Act is to provide for the security of the funds necessary to insure the delivery of the purchased merchandise *in futuro*. In upholding the statute's constitutionality the court below relied on *Memorial Gardens Association, Inc.* v. *Smith*, 16 Ill. 2d 116, 156 N. E. 2d 587 and characterized the legislative aim as "recognizing the opportunities for fraud and risk of insolvency inherent in this plan of business operation." Moreover, the Illinois Supreme Court in *Memorial Gardens Association, supra*, defined the statutory classification thusly:

> In view of the provisions of the Insurance Code regulating the manner in which burial societies may conduct their business and those of the Cemetery Care Act, the provisions of the Act in question requiring the deposit of funds in trust to guarantee contract performance are not unusual. *There is nothing unique in requiring one who contracts in futuro to give security for that performance.* (Emphasis added.)

But the Insurance Code [Ill. Rev. Stat. 1975, Chap. 73 § 958 (1)] merely provides: "The society shall not use more than sixty-five percentum of such premium or assessment for the purpose of paying commissions, salaries and other expenses of operation and the surplus shall constitute the benefit account of the society and shall be retained in cash or invested in accordance with Article III." And the relevant parts of the Cemetery Care Act [Ill. Rev. Stat. 1975, Chap. 21 § 64.4] provides: "that not less than the following amounts will be set aside and deposited in trust: 1) For graves, 20% per square foot of the space sold or 15% of the sales price, whichever is the greater . . .; 2) For a crypt not less than 10% of the sales price . . .; 3) For a niche, not less than 10% of the sales price . . ."

The question here is not whether the nature of appellant's vault business makes it a proper object for regulation. The question here is whether the 100% trusting requirements of the Act bear even a semblance of rational *nexus* with the objective intended by the statute. We would not—and we could not—question the validity of the Act if, like the "Burial Societies Act" [*ante* 8] it regulated akin to the provision that "the society shall not use more than 65% . . . for the purpose of paying commissions, salaries and other expenses of operation". But even under the most rudimentary concepts of generally accepted accounting standards a business stands or falls on its operations as a going concern and the most essential element of a going concern is spendable (not entrusted) working capital whose primary source is from the result of operations. The statute in question absolutely prevents even the possibility that working capital can be generated out of business operations and that is prohibitory rather than regulatory.

We realize that in the context of economic legislation the equal protection test is that "if the classification has some reasonable basis it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality" [*Dandridge* v. *Williams*, 397 U. S. 471, 480 quoting *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78. See also, *Idaho Department of Employment* v. *Smith*, ... U. S. ....., 46 U. S. L. W. 3368 and cases cited therein]. But here, the Act fails to even meet this test:

1. The statute purports to regulate the performance of contracts *in futuro* and thus classifies appellant in the same category as persons subject to such statutes as the Illinois Insurance Code provisions regulating burial societies [*Ante* 11].

2. The Funeral or Burial Trust Fund Act requires appellant to entrust the entire amount of its gross receipts even though the thing to be delivered *in futuro* requires less than 35% thereof.

3. Thus, the 100% entrusting provisions of the Act bear no rational relationship to the legislative objective and are otherwise violative of the Equal Protection Clause of the Fourteenth Amendment.

The irrationality of the statute clearly emerges from the following:

1. Assume gross yearly vault revenues of $10,000.

2. Assume delivery *in futuro* under current contracts to be 20 years hence.

Under the Act the entire $10,000 would have to be entrusted despite the fact that sole legislative aim is to protect only $3,500 thereof. And under Section 4 of the Act [App. C] even the interest on the entrusted $10,000 must be left on deposit until performance *in futuro*. Compounded at 6% per annum, the deposit at the end of 20 years would amount to $32,000 even though the thing to be secured remains the same—no more than $3,500.

In his concurring opinion in *Zablocki* v. *Redhail*, ... U. S. ....., 46 U. S. L. W. at 4099, Mr. Justice Stewart suggested a substantive due process approach in situations such as this and defined the test to include "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between the legislative means and purpose, the existence of alternative means for effectuating the purpose and the degree of confidence we may have that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen". In this context the Illinois Funeral or Burial Trust Fund Act again fails the test:

1. The interest affected is appellant's "liberty" and "property" rights to engage in an admittedly lawful business and it is affected to the extent of outright denial under the Act.

2. As has already been demonstrated "the rationality of the connection between legislative means and purpose" is wholly nonexistent.

3. The findings of the Report to the Federal Trade Commission [*ante* 6] and the 35% deposit provisions of the Illinois Insurance Code [*ante* 8] show, *inter alia*, that alternative means are readily available.

4. Without impugning legislative motive, the effect of the Act is to create an anti-competitive at-need market in favor of "traditional (at-need) funeral industry members" [*ante* 6] and in light of this fact there is necessarily a low "degree of confidence . . . that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen."

CONCLUSION.

For the foregoing reasons, and for others implicit therein, we believe that the questions presented by this appeal are substantial and that they involve matters of public importance.

Respectfully submitted,

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APPENDIX

APPENDIX A.

THE PEOPLE *ex rel.* GEORGE W. LINDBERG, Comptroller, Plaintiff-Appellant, v. MEMORIAL CONSULTANTS, INC., *Defendant-Appellee.*

Third District No. 76-439

Reversed and remanded.

Opinion filed July 29, 1977.—Rehearing denied August 30, 1977.

cite as 50 Ill. App. 3d 1005, 366 N. E. 2d 127

Appeal from the Circuit Court of Peoria County; the HON. CHARLES W. IBEN, *Judge, presiding.*

William J. Scott, Attorney General, of Chicago (Imelda Terrazino, Assistant Attorney General, of counsel), for appellant.

John E. Cassidy, Jr., and Roy P. Hull, both of Peoria, for appellee.

MR. PRESIDING JUSTICE STENGEL delivered the opinion of the court;

George Lindberg as Comptroller of the State of Illinois brought this action to enforce the licensing provisions of the funeral or burial funds act (Ill. Rev. Stat. 1975, ch. 111½, par. 73.103) against Memorial Consultants, Inc., an Illinois corporation doing business in this state. The act provides that persons who sell funeral merchandise under a prepayment plan must hold the proceeds of sale in trust and must be licensed by the Comptroller. This enforcement action sought an injunction to prevent defendant from doing business without a license and also sought an accounting of all sums received under prepaid contracts since 1955. Defendant filed a general denial and an

affirmative defense alleging that the statute violates defendant's constitutional rights because it is confiscatory.

At an early stage of the proceedings the Illinois State Funeral Directors Association was permitted to intervene as a party plaintiff. Defendant filed a countercomplaint claiming in count I that the members of the association have combined to eliminate competition and to restrain retail trade of burial vaults in violation of the Illinois Antitrust Act (Ill. Rev. Stat. 1975, ch. 38, par. 60–3(2)). Count II of the countercomplaint asserted a cause of action under 42 U. S. C. § 1983 for deprivation of constitutional rights resulting from enforcement of the funeral or burial funds act and prayed for an injunction restraining enforcement of the act. The intervenors then withdrew from the suit, and the trial court dismissed count I of the countercomplaint, and also dismissed count II as to all counterdefendants except George Lindberg.

The cause was submitted to the court upon a stipulation of facts, and the Circuit Court of Peoria County entered judgment for defendant. Lindberg then filed this appeal.

Section 1 of the funeral or burial funds act (Ill. Rev. Stat. 1975, ch. 111½, par. 73.101) provides as follows:

> "Any payment of money made to any person, partnership, association or corporation upon any agreement or contract, * * * which has for a purpose the furnishing or performance of funeral services, or the furnishing or delivery of any personal property, merchandise, or services of any nature in connection with the final disposition of a dead human body, for future use at a time determinable by the death of the person or persons whose body or bodies are to be so disposed of, shall be held to be trust funds, and the person, partnership, association or corporation receiving said payments is hereby declared to be a trustee thereof."

Section 2 of the act requires the trust funds to be deposited in the name of the trustee, as trustee, within 30 days after

receipt, and section 3 requires such trustees to obtain a State license from the Comptroller.

Defendant is engaged in the business of selling burial vaults. During 1972-74, defendant entered into approximately 9,000 contracts for the sale of vaults with gross receipts of $1,250,000, not all of which represented vault sales. The contracts provide for monthly installment payments of the purchase price and also provide that within 60 days after payment of the full purchase price, upon the purchaser's ~~request~~ request, defendant will deliver the merchandise purchased subject to the following conditions:

> "(a) The furnishing of or the delivery date for the merchandise and/or services designated as purchased is in no way dependent upon YOUR death or upon the death of any other person or persons.
>
> (b) YOU will within sixty (60) days after payment in full request delivery of the merchandise and services designated as purchased in the "Declarations" and [defendant] agrees that within a reasonable time following receipt of said request it will deliver to YOU said merchandise and services anywhere within the area designated in the "Declarations" at no additional cost to YOU.
>
> (c) YOU may use any or all of the merchandise and services purchased for any purpose whatsoever and for the benefit of any person or persons YOU may designate."

The contract also provides that, if the purchaser does not request delivery within 60 days following payment in full, defendant will hold the present-day cost of the merchandise in the purchaser's name. If the cost of merchandise has increased by the date of delivery, the purchaser must pay the additional cost, and if the cost has declined, the purchaser will receive a rebate.

Plaintiff Lindberg raises two issues on appeal. First, do defendant's contracts come within the purview of the statute, and second, is the statute constitutional as applied to defendant?

Defendant contends here, as in the trial court, that the statute does not apply to its sales because delivery of the vaults

is at the request of the purchaser and is not dependent upon the death of any person. We note that the parties have stipulated that the only practical and reasonable use of a burial vault is to contain a coffin, and that defendant's president knew of no instance where a vault was delivered and burial did not take place. It is apparent that in the usual course of defendant's business, vaults are delivered at the time of burial of a decedent.

Confronted with this same argument under a similar statute, the Supreme Court of Tennessee said:

> "[O]nly a rare and eccentric individual would in person, or through an agent, purchase for himself a coffin and grave clothes before he died. Human nature is such that the individual revolts at acquiring and possessing during his lifetime such gruesome tokens of his end. A person, not abnormal, would not have such things around him during his lifetime.
>
> The nature of a business pursued by anyone is not determined by the things that may possibly be done in that business or by things that possibly have been done. It is determined rather by the usual course of the particular business." *State ex rel. Attorney General* v. *Smith Funeral Service, Inc.* (1940), 177 Tenn. 41, 44, 145 S.W.2d 1021, 1023. Accord, *State ex rel. Londerholm* v. *Anderson* (1965), 195 Kan. 649, 408 P.2d 864.

In the only Illinois case arising under this statute, the contracts also provided for delivery "upon request." Although the issue of applicability of the statute was apparently not contested, the court did observe:

> "The contract does not contemplate that delivery will be made or services rendered until after the death of the purchaser." *Memorial Gardens Association, Inc.* v. *Smith* (1959), 16 Ill. 2d 116, 122, 156 N.E.2d 587.

1. We thus conclude that the provisions for delivery upon request do not change the character of defendant's contracts. These sales agreements are for the purpose of furnishing burial merchandise for future use at a time determinable by the death

of a person to be buried, and as such are governed by the statute.

Defendant also argues that its contracts are outside the scope of the act because, under the terms of the contract, the purchaser can request delivery of a vault for burial of some other person. As plaintiff points out, section 1 of the act is not limited to contracts providing for burial of the purchaser but instead refers to "* * * the death of the person or persons whose body or bodies are to be disposed of * * *."

Defendant also attempts to read a like limitation into section 4 of the act (Ill. Rev. Stat. 1975, ch. 111½, par. 73.104) which prohibits withdrawals of the trust fund "until the death of the person or persons for whose funeral or burial such funds were paid, unless sooner withdrawn and repaid" to the purchaser under the terms of the contract. Again the plain language of this section permits withdrawal of the purchase price either at the death of the beneficiary of the contract or sooner if the purchaser so requests and if the contract so permits. Obviously this means the purchaser may use the burial vault for himself or may designate some other beneficiary.

In *Reserve Vault Corp.* v. *Jones* (1962), 234 Ark. 1011, 356 S. W. 2d 225, the seller of burial vaults argued that an Arkansas statute licensing sellers of prepaid funeral expenses applied only to contracts which are dependent upon the death of the contracting party. The court stated:

> "Of course, a purchaser might have in mind another member of his family when buying the vault, and it might be likewise considered that certainly, in numerous instances the vault *would* be purchased for the benefit of the contracting party. Accordingly, if appellants' view were correct, the same exact contract would be sometimes within the purview of the Act, and sometimes without the purview of the Act, depending upon whether the contracting party purchased the vault in contemplation of his own death, or in contemplation of the death of some member of his family. Such an interpretation would leave the matter in total

> confusion, and would open the door to evasive practices. Actually a purchaser probably would not know for whom the vault was being acquired, the answer to that question depending upon which member of the family first died. At any rate, we find no merit in the contention, and hold that delivery of a vault, under [the contract in question], is conditioned upon a demand made pursuant to a death." 356 S. W. 2d 225, 228. Accord, *Falkner* v. *Memorial Gardens Association* Tex. Civ. App. 1957), 298 S. W. 2d 934.

As the cited authorities indicate, the statutory construction urged by defendant would emasculate the act and defeat the clearly expressed legislative intent to regulate all prepaid burial contracts. Hence, we reject defendant's interpretation.

2. Likewise, defendant cannot avoid operation of the act by an express contractual provision that delivery is not dependent upon the death of any person (see paragraph 5(a) of the contract quoted above). Such a provision is meaningless since it is not only contrary to the usual course of defendant's business, as stipulated by the parties, but in fact is contrary to the obvious purpose and intent of the contract. Also, it is a well-accepted rule that the benefits of a statute may not be waived by an individual in cases where the statute was enacted for the protection of the public generally. *Foreman* v. *Holsman* (1957), 10 Ill. 2d 551, 141 N. E. 2d 31.

The final question is whether the act is constitutional as applied to defendant. Defendant contends that the statute is arbitrary, confiscatory, and unreasonable with no substantial relationship to the public interest sought to be protected. Defendant admits that the burial vault business is a proper object for regulation, but suggests that the requirements that 100% of the purchase price and interest thereon be held in trust makes it impossible to obtain the "working capital" necessary to meet current operating expenses. The cost of the vaults is asserted to be only 35% of the purchase price and the only amount necessary to be secured. Thus, rather than regulatory, the statute is said to be prohibitory.

We first note that section 5 of the act permits the trustee of the funds to receive reasonable expenses and compensation not to exceed 5% of the principal and 5% of the earnings.

3. This same constitutional argument was considered in *Memorial Gardens Association, Inc.* v. *Smith* (1959), 16 Ill. 2d 116, 156 N. E. 2d 587, where the seller of caskets, vaults, grave markers and related services argued that the act was an unwarranted exercise of police power, and was confiscatory of its business in violation of the due process provisions of both the State and Federal constitutions. The court upheld the statute and found that the act regulated the manner in which the business of selling prepaid burial services and merchandise may be conducted but did not prohibit sales in advance of need. Recognizing the opportunities for fraud and risk of insolvency inherent in this plan of business operation, the court stated that such procedure invites regulation of a stringent nature, and then said:

> "Practically, plaintiffs will no longer be able to collect prospective profits in advance, without furnishing an adequate guarantee for performance. However, this does not prohibit the operation of this type of business. A large discretion is necessarily vested in the legislature to determine not only what the interests of the public welfare require, but what measures are necessary to secure such interests. [Citations.] Plaintiffs' argument amounts to an admission that they will be unable to compete with others who sell the same merchandise and services at the time of actual need. However, the public welfare need not be abrogated to enable an individual to carry on his business * * *.

Plaintiffs contend that the act constitutes an unwarranted interference with the right of citizens to contract with each other and thus violates constitutional guarantees of both the State and Federal constitutions. While rights of contract are favored and protected there is no principle of absolute freedom of contract. It is a qualified right and the State may, in its legitimate exercise of the police power, pass laws which limit or affect the right of contract so long

as those regulations are reasonably necessary to secure the health, safety, morals or general welfare of the community. [Citation.] The constitutional guarantee does not withdraw from legislative supervision that department of human activity which consists in the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies only the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. [Citations.] In the exercise of the police power it becomes necessary to prohibit some forms of contract entirely and to restrict others, yet the right to do so is unquestioned when the public welfare demands it. * * * The regulations contained in the present act do not amount to an arbitrary or unwarranted interference with contract rights. The act neither prohibits the right to sell the services or merchandise, nor proscribes advance collections. It does require that such funds, when collected, be set aside for the purpose for which they were intended. The public has a vital interest in securing that result and, insofar as the rights of plaintiffs are affected, those considerations must yield to the paramount public welfare." 16 Ill. 2d 116, 127-29, 156 N. E. 2d 587, 594-95.

Other States with similar statutes have also held them to be constitutional. *State ex rel. Londerholm* v. *Anderson* (1965), 195 Kan. 649, 408 P. 2d 884; *Utah Funeral Directors & Embalmers Association* v. *Memorial Gardens of the Valley, Inc.* (1965), 17 Utah 2d 227, 408 P. 2d 190; *Messerli* v. *Monarch Memorial Gardens, Inc.* (1964), 88 Idaho 88, 397 P. 2d 34; *Reserve Vault Corp.* v. *Jones* (1962), 234 Ark. 1011, 356 S. W. 2d 225; *Falkner* v. *Memorial Garden Assoc.* (Tex. Civ. App. 1957), 298 S. W. 2d 934; *State ex rel. Attorney General* v. *Smith Funeral Service, Inc.* (1940), 177 Tenn. 41, 145 S. W. 2d 1021. Contra, *State* v. *Memorial Gardens Development Corp.* (1957), 143 W. Va. 182, 101 S. E. 2d 425, 68 A. L. R. 2d 1233; *State* v. *Gateway Mortuaries, Inc.* (1930), 87 Mont. 225, 287 P. 156, 68 A. L. R. 1512.

The weight of authority is clear and so is the law of Illinois. The act is constitutional as applied to defendant. The circuit court erred in entering judgment for defendant. We therefore reverse the judgment and remand for further proceedings consistent with this opinion.

Reversed and remanded.

BARRY and SCOTT, *JJ.*, concur.

APPENDIX B.

No. 76-439

IN THE APPELLATE COURT OF ILLINOIS
Third District
A. D. 1977

PEOPLE OF THE STATE OF ILLINOIS ex rel. GEORGE W. LINDBERG, Comptroller of the State of Illinois, *Plaintiff-Appellant,*	Appeal from the Circuit Court of the Tenth Judicial Circuit, Peoria County.
vs.	
MEMORIAL CONSULTANTS, INC., *Defendant-Appellee.*	Honorable Charles W. Iben, Judge Presiding.

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Memorial Consultants, Inc., hereby appeals to the Supreme Court of the United States from the opinion and judgment reversing and remanding the judgment of The Circuit Court of the Tenth Judicial Circuit, Peoria County, Illinois [*People ex rel. Lindberg* v. *Memorial Consultants, Inc.*, 50 Ill. App. 3d 1005].

This Court's opinion and judgment was entered on July 29, 1977 and thereafter became final on November 23, 1977 when the Supreme Court of Illinois denied petition for leave to appeal which had been timely filed, under Rule 315 of the Rules of the Supreme Court of Illinois [Ill. Rev. Stat., Chap. 100 § 315].

This appeal is taken pursuant to 28 U. S. C. § 1257(2).

Proof of service.

/s/ JOHN E. CASSIDY, JR.,
John E. Cassidy, Jr.,
Attorney for Appellant,
Memorial Consultants, Inc.

APPENDIX C.

STATUTES INVOLVED.

Ill. Rev. Stat., 1969, Ch. 111½, § 73.101:

73.101 Nature of payment.] § 1. Any payment of money made to any person, partnership, association or corporation upon any agreement or contract, or any series or combination of agreements or contracts, which has for a purpose the furnishing or performance of funeral services, or the furnishing or delivery of any personal property, merchandise, or services of any nature in connection with the final disposition of a dead human body, for future use at a time determinable by the death of the person or persons whose body or bodies are to be disposed of, shall be held to be trust funds, and the person, partnership, association or corporation receiving said payments is hereby declared to be a trustee thereof.

Ill. Rev. Stat., 1969, Ch. 111½, § 73.102:

73.102 Deposit of trust funds.] § 2. All such trust funds shall be deposited in the name of the trustee, as trustee, within 30 days after receipt thereof, with either a bank or trust company authorized to do business in the State of Illinois, or a Federal Savings and Loan Association or Illinois Savings and Loan Association where investments are protected by the Federal Savings and Loan Insurance Corporation. The trustees at the time of making deposit shall furnish to the depositary the name of each payor, and the amount of payment on each such account for which deposit is being so made. As amended by act approved July 7, 1965. L. 1965, p. 1284.

Ill. Rev. Stat., 1969, Ch, 111½, § 73.103:

73.103 License — Necessity — Applications — Bond — Records — Annual report — Investigation of records— Revocation and surrender of license.] § 3. No person, firm, partnership, association or corporation may act as

trustee without first securing from the Auditor of Public Accounts (hereafter called the Auditor) a license to so act. Application for such license shall be in writing, signed by the applicant and duly verified in forms furnished by the Auditor. Each application shall contain at least the following: (1) The full name and address (both residence and place of business) of the applicant, and every member, officer and director thereof if the applicant is a firm, partnership, association or corporation. Any license issued pursuant to the application shall be valid only at the address stated in the application for such applicant or at such new address as may be approved by the Auditor; (2) a detailed statement of the applicant's assets and liabilities; and (3) applications for license shall be accompanied by a fidelity bond executed by the applicant and a surety company authorized to do business in this State in such amount not exceeding $10,000 as the Auditor may require. Upon receipt of such application and bond the Auditor shall issue a license unless he shall determine that the applicant has made false statements or representations in such application, or is insolvent, or has conducted or is about to conduct his business in a fraudulent manner, or is not duly authorized to transact business in this State. Such license shall be kept conspicuously posted in the place of business of the licensee. The Auditor may require additional bond from time to time in amounts equal to one-tenth of such trust funds, which bond shall run to the Auditor for the use and benefit of the beneficiaries of such trust funds. Such licensee may be written permit of the Auditor, be authorized to operate without additional bond, except such fidelity bond as may be required by the Auditor for the protection of the licensee against loss by default by any of its employees engaged in the handling of trust funds. The licensee shall keep accurate accounts, books and records in this State of all transactions, copies of all agreements, dates and amounts of payments made and accepted thereon, the names and addresses of the contracting parties, the persons for whose benefit such funds are accepted, and the names of the depositaries of such funds. The licensee shall make reports to the Auditor annually or at such other time as the Auditor may require, on forms furnished by the Auditor. Every application shall be accompanied by a fee of $10.00 and every report shall be accompanied by a fee of $2.00. The licensee shall make all such books and records pertaining to such trust funds available to the Auditor for examination. The Auditor, or a qualified person designated by him, may at any time investigate the books, records and accounts of the licensee with respect to its trust funds and for that purpose may require the attendance of and examine under oath all persons whose testimony he may require. The cost of such examination shall be borne by the licensee. In the event such investigation or other information received by the Auditor discloses a substantial violation of the requirements of this Act, the Auditor shall revoke the license of such person. Such licensee may terminate all further responsibility for compliance with the requirements of this Act by voluntarily surrendering his license to the Auditor, or in the event of its loss, furnishing the Auditor with a sworn statement to that effect, which states his intention to discontinue acceptance of pre-burial funds. Such license or statement must be accompanied by an affidavit that said licensee has lawfully expended or refunded all pre-burial funds accepted by him, and that he will accept no additional pre-burial funds. The Auditor shall immediately cancel or revoke said license. As amended by act approved July 7, 1965. L. 1965, p. 1284.

Ill. Rev. Stat., 1969, Ch. 111½, § 73.104:

73.104 Withdrawal of funds.] § 4. The amount or amounts so deposited, with interest thereon, if any, shall not be withdrawn until the death of the person or persons for whose funeral or burial such funds were paid, unless sooner withdrawn and repaid to the person who originally paid the money under or in connection with said agreement or series of agreements, or to his or her legal representative; provided, that if the agreement or series of agreements provides for forfeiture and retention of any or all payments by reason of default in payment upon and according to the terms thereof, then upon any such default and forfeiture the trustee may withdraw such deposits; and further provided, nothing herein contained prohibits the change of depositary by the trustee and the transfer of trust funds from one depositary to another.

APPENDIX D.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

REPORT OF THE PRESIDING OFFICER ON PROPOSED TRADE REGULATION RULE CONCERNING FUNERAL INDUSTRY PRACTICES

[16 C. F. R. Part 453]

[Public Record 215-46]

This report, required by Section 1.13(f) of the Commission's Rules of Practice, contains the Presiding Officer's summary of the public record and initial findings and conclusions with regard to those issues designated by the Presiding Officer and such other findings and conclusions as he sees fit. The report has not been adopted or reviewed on the merits by the Bureau of Consumer Protection or reviewed or adopted by the Commission. The Commission's final determination in this rulemaking proceeding will be based upon the record taken as a whole, including this report by the Presiding Officer, the report and recommendations prepared by the staff under Section 1.13(g) of the Rules of Practice, and comments upon these reports received during the 60-day period after the staff report has been placed on the public record.

JACK E. KAHN,
Presiding Officer.

July 1977

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UNITED STATES OF AMERICA BEFORE
FEDERAL TRADE COMMISSION

In the Matter of Proposed Trade Regulation Rule Concerning Funeral Industry Practices

[16 CFR Part 453]

Public Record
File No. 215-46

Findings and Conclusions with Respect to Issues
by: Jack E. Kahn, Presiding Officer

I. INTRODUCTION AND GENERAL ISSUES RELATING TO THE PROCEEDINGS.

A. Preface

On August 29, 1975, the Commission published its initial notice of a proposed Trade Regulation Rule Concerning Funeral Industry Practices.[1] Some years prior to the publication of that notice, the staff of the Bureau of Consumer Protection began an investigation of funeral industry practices which resulted in a staff report containing the results of the investigation and the proposal of a rulemaking proceeding.[2] That staff report formed in large part the basis of the Commission's action in proposing the trade regulation rule for the funeral industry (hereinafter referred to as the proposed rule).

Consistent with that initial notice, the record of the proceeding was opened for comments both on the practices toward which the proposed rule was directed as well as the staff report upon which it was largely based. The response to the call for comment illustrated widely divergent attitudes toward the proposed rule. Generally, comments from industry sources were strongly opposed to the proposed rule. Some consumers were also op-

1. 40 Fed. Reg. 39901, August 29, 1975.

2. FTC Staff Memorandum, Record VI-D-41.

posed. Many consumers and consumer representative groups commented favorably upon the proposed rule. All of these comments are now a part of the record.

State regulatory boards have increased educational requirements as a prerequisite to licensure with the result that entry into this market its restricted, particularly the immediate disposal services whose owners or operators may not be able to pass the increased qualifications for a license.

Issue No. 30

"Pre-need sales. (a) Can funeral consumers obtain lower prices and avoid problems associated with at-need sales by making funeral arrangements in advance of need?"

"(b) Has the availability of before-need arrangements been restricted in ways which injure rather than protect consumer interests, by State laws or regulations, or by actions of funeral service industry members of trade associations?"

In its Statement of Reason for the proposed rule, the Commission stated that it has reason to believe that "Actions by funeral industry members to inhibit economical funeral offerings, pre-need arrangements, immediate disposition services, or memorial societies disadvantage consumers by restricting their choice of funeral arrangements and may suppress competition in that industry."[93]

The question of pre-need planning of one's own funeral as opposed to at-need sales to the survivors received considerable attention during this proceeding.

Consistently raised was the question of who should make the determination as to type of funeral, the subject of the ceremony (obviously) before demise or the survivors after demise. While the legal right to enforce such arrangements may vary with the jurisdiction,[94] pre-arrangement provides the con-

93. 40 Fed. Reg. 39905.

94. *See, e.g.*, testimony of Byron D. Sher, professor of law, Tr. 7530-31.

sumer with peace of mind in that the final arrangements have been made to one's satisfaction at satisfactory prices. Eliminated is any guess as to what the deceased desired.

A number of objections have been raised to pre-need planning and firm pre-arrangement of funerals. One argument is the mobility of people in our society which has been commented on previously.[95] Some purchasers do not move a great distance and thus could obtain the benefits of the pre-need contract by remaining in the vicinity. Additionally, pre-need contracts have been drawn to allow for refunds or for reciprocal honoring of contracts at convenient locations.[96]

An argument was raised that some people would make bizarre arrangements to spite the survivors.[97] This may be one of the risks of a free society. Furthermore, pre-arranged funerals may be made by families together after consideration of all the alternatives.[98] Pre-arrangement for many people affords the opportunity to face death and plan for it without leaving this task to survivors.

Some people change their minds about the types of funeral they want after entering into a pre-need arrangement.[99] If that is the case such contracts may be changed by mutual agreement.

An important consideration, perhaps above many others, is the concept of freedom of choice. While this can mean the freedom to choose a "traditional" at-need funeral, it should also include the freedom to arrange prior to death one's own

95. *See, e.g.,* testimony of Mildred Damiano, funeral director, Tr. 1305-06.

96. *See* testimony of John Lawton, president, Sierra Memorial Services, Inc., Tr. 6489-92.

97. Testimony of Robert P. Shackelford, Jr., funeral director, Tr. 9058-60.

98. Rebuttal submission of Prearrangement Interment Association of America, Record X-6, Part II, p. 5.

99. *See, e.g.,* testimony of H. E. Burton, president, Palm Memorial Estate Plans, Tr. 6643 and testimony of Patrick J. Farmer, funeral director, Tr. 2301-02.

services without having the availability of such services restricted by law, regulation or peer pressure, provided such arrangements do not offend public policy or sensibilities.

Those who sell funerals on a pre-need basis feel that the funeral industry as a whole today does not advocate and does not actively engage in pre-need sales.[100] In fact, the industry actively supports legislation to restrict pre-need sales. Representative H. Lynn Jondall, Michigan House of Representatives, discussed techniques used by the Michigan Funeral Directors Association to prohibit the development of pre-need programs.[101]

There is little evidence in the record of the proceeding to support a finding as to whether consumers can obtain lower prices by making funeral arrangements in advance. There are, however, benefits, albeit noneconomic, as previously discussed: the exercise of freedom of choice without the time pressures and disorientation which are usually present in a sale at-need.

The record contains numerous statements from witnesses in regard to the sales tactics and pressures employed by pre-need arrangement salespersons.[102] As a result, the at-need funeral industry has sponsored and supported state laws which prevent the solicitation of consumers for the purchase of funeral service merchandise before death.[103] While there may be some evidence of improper sales tactics and pressures, it taxes credulity to insist that such pressures cannot be handled better before-need than in the at-need situation. The opening of this market would protect consumers from any possibility of pressure at a trying moment in their lives. The consumer, makin[illegible] a purchase with

100. *See, e.g.,* Prearrangement Interment Association of America, note 98 *supra,* at Part II, p. 7.

101. Tr. 4079.

102. *See, e.g.,* testimony of Roger I. Dyer, funeral director Tr. 1556.

103. *See, e.g.,* written submission of Prearrangement Interment Association of America, at volumes I-III and testimony of Robert W. Ninker, executive director, Illinois Funeral Directors Association Tr. 2711-13.

a great deal of time, with opportunity to investigate alternatives and comparison shop and to become acquainted with what may be unfamiliar products and services, is more capable of dealing with this problem. Since most pre-need sales are made in the home, the cooling-off period is available and, in fact, many practitioners offer from 10 to 30 days in order to rescind the entire transaction.[104] The record indicates that only 30 percent of prospective pre-need purchasers actually sign contracts at the time they are visited by a salesperson.[105] The opportunity to decline is not available in the at-need situation.

Among the devices used by the funeral industry to restrict pre-need sales are state laws and regulations that require a 100 percent burial trust fund deposit of pre-need funds.[106] The at-need funeral industry position was virtually unanimous: that a 100 percent deposit requirement is necessary and the consumer must have an unlimited right to a refund of the entire amount.[107] The reasons for this are to protect the consumer and insure the seller's ability to deliver at a future time.[108]

If a seller must deposit 100 percent of the sales price of a pre-need contract, he will have no funds to pay overhead, particularly salaries and commissions until a distant future date, when a demise occurs, the contract is performed and the funds released from trust. Without funds to pay overhead, prospective sellers of pre-need funerals will not enter this market.

If a seller must refund the total sales price (plus interest in some cases) upon request of the contracting consumer, then he

104. *See* Burton, note 99 *supra,* at 6670.

105. *Id.*

106. *See, e.g.,* Prearrangement Interment Association of America, note 98 *supra,* at volumes I-III and testimony of Robert Coats, funeral director and president, Michigan Funeral Directors Association, Tr. 3785-86.

107. *See, e.g.,* testimony of Edward J. Fitzgerald, Funeral Director and past President, NFDA, and testimony of Mark Waterston, funeral director, Tr. 3746-47.

108. *See, e.g.,* Fitzgerald, *id.*

has only the possibility of that future income. Direct home sellers of pre-need funeral merchandise cannot subsidize sales for many years, particularly when the contract can be rescinded unconditionally.[109] As a consequence, if a seller will not sell, the consumer is deprived of the opportunity to choose freely among alternatives which should be available to him.

As to protecting the consumer by virtue of the 100 percent depository requirement, one funeral industry argument is that such a requirement protects the consumer from fraud.[110] A number of frauds have taken place in pre-need sales. In each instance of fraud or non-performance the cause of defalcation was not the percentage deposited under state law, but rather that funds were never deposited at all, a risk not anticipated by the 100 percent trust fund law. In states that require a 100 percent deposit and a 100 percent refund upon the changing of the mind of the consumer, there are few administrative procedures in operation such as licensing or auditing which would insure compliance with this law. As a result, the state laws as presently written inhibit the honest vendor and do not control the dishonest.

If a 100 percent requirement is excessive, what then is an appropriate actuarially based requirement? An official of the Comptroller of the State of Illinois made a study of the burial trust law in Illinois with a view toward new legislation in this area.[111] As a part of that study, an actuarial analysis was pre-

109. *See, e.g.,* statement of D. W. Necomer, IV, D. W. Necomers Sons, Record 215-46-1-29-9, No. 92, p. 3, testimony of Roger C. Nauert, executive assistant to the comptroller of the State of Illinois, Tr. 3680, Lawton, note 96 *supra,* at 6510, Burton, note 99, *supra,* at 6643-48, testimony of Paul Butler, Funeral Security Plans, Inc., Tr. 12818 and testimony of Richard Myers, Chairman of the Utah State Board of Funeral Directors and Embalmers who stated, "If there had been a 100 percent law, the [pre-need] firm never would have been selling the program." Tr. 8327.

110. *See, e.g.,* Fitzgerald, note 107 *supra,* at 6295 and testimony of Myers, note 109 *supra,* at 8326-27.

111. *See* Prearrangement Interment Association of America, note 100 *supra,* at Part II, pp. 15-17.

pared for the Illinois Cemetery Association by Risk Mangement Consultants, a technical service of Marsh & McLennan.[112]

The study indicates that the deposit of the current *cost* (not the sales price) of merchandise or services, assuming a 6 percent return and 6 percent inflation rate, would provide adequate funds to deliver such goods and services at any given time in the future. Results will vary as assumptions vary. The study, however, substantiates the position that a 100 percent deposit is not necessary as a requirement to guarantee delivery of promised funeral goods and services at a later date. Some states have already enacted laws requiring less than 100 percent with no apparent problems resulting from that aspect of these laws.[113]

Summary: The funeral consumer can avoid problems associated with at-need sales by making funeral arrangements in advance of need. His opportunity to do so is presently restricted by the 100 percent trust fund laws as well as the antisolicitation statutes. These restrictive laws have been sponsored by traditional (at-need) funeral industry members.

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112. *Id.* at Part II, Exhibit A.

113. *See* Lawton, note 96 *supra*, at 6456-60, 6511.